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No. 03-1457

In the Supreme Court of the United States

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

CRESCENT WHARF AND WAREHOUSE CO., ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, permits liability for a cumulative injury claim to be assigned to the last employer for whom the claimant worked prior to seeking treatment for the injury, where the claimant's compensable disability was fully determined prior to the date he worked for that employer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 339 F.3d 1102. The decisions of the Benefits Review Board (Pet. App. 10-22) and the administrative law judge (Pet. App. 23-72) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2003. A petition for rehearing was denied on January 26, 2004 (Pet. App. 73). The petition for a writ of certiorari was filed on April 19, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, pro-

vides compensation for work-related injuries that result in the disability or death of covered employees engaged in maritime work. 33 U.S.C. 902(3), 903. "Disability" is defined in relevant part as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). The Act prescribes compensation according to the character and quality of the disability. Thus, for example, "[t]emporary total disability" is compensated during the period of disability at a rate of two-thirds of the claimant's average weekly wages. 33 U.S.C. 908(b). Certain "[p]ermanent partial" disabilities are compensated according to a statutory schedule that lists rates for the permanent loss or loss of use of various body parts or faculties. See, *e.g.*, 33 U.S.C. 908(c)(2) (loss of a leg is compensated at the rate of two-thirds of the claimant's average weekly wages for 288 weeks); see also *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153, 155-158 (1993) (describing compensation structure for permanent partial disability under the Act).

The LHWCA makes "[e]very employer" liable for compensation payable to its employees, "irrespective of fault as a cause for the injury." 33 U.S.C. 904(a) and (b). Where more than one employer exposed the employee to conditions that may have caused or contributed to the employee's injury or disease, the statute does not apportion liability among the employers. Instead, courts of appeals and the Director of the Office of Workers' Compensation Programs (OWCP), who administers the LHWCA for the Secretary of Labor, see 33 U.S.C. 939; 20 C.F.R. 701.202(a), have concluded that a "last employer rule" applies, under which full liability falls upon "the employer during the last employment in which the claimant was exposed to injurious stimuli,

prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment." *Travelers Ins. Co.* v. *Cardillo*, 225 F.2d 137, 145 (2d Cir.), cert. denied, 350 U.S. 913 (1955); see, *e.g.*, *Norfolk Shipbldg. & Drydock Corp.* v. *Faulk*, 228 F.3d 378, 384 (4th Cir. 2000), cert. denied, 531 U.S. 1112 (2001); *Bath Iron Works* v. *Brown*, 194 F.3d 1, 6 (1st Cir. 1999); *Cordero* v. *Triple A Mach. Shop*, 580 F.2d 1331, 1337 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979).

The Ninth Circuit has taken the position that the last employer rule "is applied differently depending on whether a claimant's disability is characterized as an occupational disease or a two-injury case." *Kelaita* v. *Director, OWCP*, 799 F.2d 1308, 1311 (1986); see also Pet. App. 4-5; *Foundation Constructors, Inc.* v. *Director, OWCP*, 950 F.2d 621, 623-624 (1991). In the two-injury context, "[i]f the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible." *Id.* at 624. "If, on the other hand, the subsequent injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible." *Ibid.*

2. Respondent William Price worked as an industrial mechanic and forklift driver for several maritime employers from the mid-1960s until the spring of 1995. Pet. App. 25, 29. Price experienced knee problems throughout this period. *Id.* at 25. On September 23, 1993, he was examined by an orthopedist, who concluded that Price needed total knee replacement surgery "when [he] is ready." *Id.* at 26. Price's most re-

cent employer prior to that examination was Crescent City Marine Ways, for which Price worked as a lift truck operator on September 16, 1993. *Ibid.*

Price received injections and other pain medications thereafter while continuing to work sporadically for various employers. Pet. App. 26-27. On December 16, 1994, Price visited an orthopedic surgeon and decided that he was ready to undergo knee replacement surgery for both knees. *Id.* at 27. Price's last employer prior to the December 16 medical visit was Crescent Wharf and Warehouse, which employed him as a lift truck operator on December 4, 1994. *Ibid.*

Price's knee replacement surgery was scheduled for April 24, 1995. Pet. App. 29. He continued to work sporadically before then, and his last work prior to undergoing surgery occurred on April 22, 1995, when petitioner Metropolitan Stevedore Company employed him as a forklift operator. *Ibid.* After the surgery, Price returned to work in November 1995 until his retirement in January 1997. *Id.* at 30-31.

3. Price filed a claim for disability benefits under the LHWCA against petitioner and several other maritime employers for whom he had worked before his surgery. Pet. App. 31. After conducting a trial, the administrative law judge (ALJ) determined, in accordance with applicable American Medical Association (AMA) guidelines, that Price lost 37% of the use of each leg as a result of his knee problems.[1] *Id.* at 65. Based upon this finding, the ALJ concluded that Price was entitled to

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[1] The AMA guidelines assign a loss of use percentage to each of three possible outcomes for knee replacement surgery. If the outcome is "good," loss of use equals 37%; if the outcome is "fair," the loss equals 50%; and if the outcome is "poor," the loss equals 75%. Pet. App. 61.

permanent partial disability benefits for 106.56 weeks for each leg, pursuant to Section 8(c)(2) and (19) of the LHWCA, 33 U.S.C. 908(c)(2) and (19). Pet. App. 60, 65.[2] The ALJ also determined that Price was entitled to temporary total disability for the period between April 24, 1995, and November 5, 1995. *Id.* at 70.

Based upon Price's employment with petitioner on April 22, 1995, the ALJ determined that petitioner was the last responsible employer and was therefore liable for the disability award. Pet. App. 33-47. Under the Ninth Circuit's two-injury rule, the ALJ explained, petitioner was responsible for the award because Price's work on April 22 "did in fact cause some minor but permanent increase in the extent of his disability and increase the need for his knee surgery." *Id.* at 41; see also *id.* at 33-34, 36. The ALJ based this conclusion on the testimony of doctors who opined that Price's knee condition had continued to deteriorate up to the date of the surgery. *Id.* at 41-42. The ALJ acknowledged, however, that the record demonstrated that "any injury that might have occurred during the course of the claimant's April 22, 1995 employment did not cause his knee replacement surgery to occur any sooner, lengthen the post-surgery period of temporary disability, or increase the extent of the claimant's

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[2] Section 8(c)(2) provides that permanent partial disability compensation for the loss of a full leg is payable, at two-thirds of the worker's pre-injury average weekly wage, for 288 weeks. 33 U.S.C. 908(c)(2). Under Section 8(c)(19), 33 U.S.C. 908(c)(19), when the injury "results in a partial loss of the use of a scheduled member * * * compensation is to be calculated as a proportionate loss of the use of that member." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 271 n.4 (1980). In this case, because Price lost 37% of the use of each leg, the ALJ multiplied 288 weeks by 37% to arrive at the 106.56 figure.

permanent disability." *Id.* at 43-44. The ALJ nonetheless determined that "this finding does not provide sufficient legal grounds for assigning last responsible employer liability to some other employer." *Id.* at 44.

Petitioner appealed to the Department of Labor's Benefits Review Board (BRB). Pet. App. 12. The BRB affirmed, finding the ALJ's decision to be "consistent with the applicable legal principles enunciated by the Ninth Circuit with respect to cumulative traumatic injury cases." *Id.* at 19. Petitioner then filed a petition for review of the BRB's decision with the Ninth Circuit. *Id.* at 2.

4. The court of appeals affirmed the BRB's decision. Pet. App. 1-9. After determining that the two-injury rule properly applied in this case, the court found that substantial evidence supported the ALJ's finding that Price's knee condition was aggravated by the work he performed for petitioner on April 22, 1995. *Id.* at 5-6. The court then framed the question as "whether that aggravation was of the 'disability,' as defined by the Act and interpreted by case law." *Id.* at 6.

The court concluded that it was, because Price's employment with petitioner "contributed to his injury." Pet. App. 8. In so ruling, the court rejected the contention that diminished earning capacity should be used as the "benchmark" to determine the point at which the disability occurs in two-injury cases. *Ibid.* ("It is unnecessary and undesirable to use diminished earning capacity as the identifying feature of the disability in two-injury cases."). The court acknowledged that, in applying the last responsible employer rule to occupational diseases, other circuits have treated "disability" solely as an economic concept. *Ibid.* The court distinguished those cases on the ground that, "[i]n occupational disease claims, it is necessary to define dis-

ability in terms of loss of earning capacity, because the lack of medical certainty with respect to these diseases makes it difficult to connect the progression of the disease with particular points in time or specific work experiences." *Id.* at 7-8. In contrast, the court reasoned, cumulative injuries "are not necessarily fraught with the same inherent ambiguity and can be correlated more directly with identifiable work activities at particular times." *Id.* at 8. Treating "disability" as an economic concept, the court concluded, "would introduce new uncertainty into the process of determining liability under the last employer rule." *Ibid.*

ARGUMENT

The court of appeals erred by holding that "disability" is a function of physical rather than economic harm for the purpose of assigning liability among maritime employers who expose workers to cumulative injuries. Further review of the court of appeals' decision, however, is not warranted. The decision does not directly conflict with any decision of this Court or any other court of appeals.

1. Section 2(10) of the LHWCA defines "[d]isability" in relevant part as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). In light of this definition, this Court has stressed that "[t]he LHWCA authorizes compensation not for physical injury as such, but for economic harm to the injured worker from decreased ability to earn wages." *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 126 (1997). "The Act speaks of this economic harm as 'disability,'" which is a "measure of earning capacity lost as a result of work-related injury." *Id.* at 126, 127; see also *id.* at 141 (O'Connor, J.,

dissenting) ("It is common ground that 'disability' under the LHWCA is an economic, rather than a medical, concept.").[3] The courts of appeals have adhered to this understanding in a variety of contexts, including application of the last employer rule. See, *e.g.*, *Liberty Mut. Ins. Co.* v. *Commercial Union Ins. Co.*, 978 F.2d 750, 759 (1st Cir. 1992) (holding in unscheduled injury case that the "date of disability, as determined by the date of decreased earning capacity, fixes liability as among successive insurers for LHWCA purposes"); *Stevens* v. *Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990) (with respect to distinction between total and partial disability, LHWCA's definition of disability "encompasses an economic, wage-earning aspect"), cert. denied, 498 U.S. 1073 (1991); *Cordero* v. *Triple A Mach. Shop*, 580 F.2d 1331, 1334 (9th Cir. 1978) (noting in unscheduled occupational disease context that "disability is an economic concept based upon a medical foundation"), cert. denied, 440 U.S. 911 (1979).

The court of appeals below deviated from this well-established understanding of "disability" and instead adopted a conception of "disability" that focuses exclusively on changes in the claimant's physical injuries. Pet. App. 6. That approach, the court reasoned, was justified in light of the increased "medical certainty" with which cumulative traumatic injuries "can be corre-

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[3] In limited instances, disability under the Act is not directly related to lost earning capacity. The statute, for example, defines disability as "permanent impairment" in cases involving delayed manifestation occupational diseases that appear only after the worker has retired for other reasons. 33 U.S.C. 902(10), 910(d)(2). In addition, lost earning capacity is conclusively presumed with respect to claims that fall within the schedule of impairments set forth in Section 8(c) of the Act. See 33 U.S.C. 908(c)(1)-(19); *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 296 (1995).

lated more directly with identifiable work activities at particular times." *Id.* at 7-8. Adding consideration of diminished earning capacity in such cases, the court concluded, would be "unnecessary and undesirable." *Ibid.*

Even assuming *arguendo* that there is a legitimate reason for treating "two-injury" cases differently from occupational disease cases under the last employer rule, the court of appeals' justification for applying differing conceptions of "disability" is flawed.[4] In occupational disease claims, disability is defined in terms of loss of earning capacity not because of the difficulties in tracking the progression of the disease, but rather because the statute itself clearly equates "disability" with the incapacity to earn wages. 33 U.S.C. 902(10); *Rambo*, 521 U.S. at 126-127. Nothing in the statute's text, structure, or legislative history indicates that Congress intended a different, judge-made definition to govern cumulative trauma cases.

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[4] The Director of the OWCP does not agree with the view that "two-injury" cases are properly scrutinized under a formulation of the last employer rule that differs from the rule applicable to occupational disease cases. In the Director's view, liability should fall in all cases on the last employer to have exposed the claimant to injurious stimuli before the compensable disability for which compensation is sought is shown to have existed. See *Stevedoring Servs. of Am.* v. *Director, OWCP (Benjamin)*, 297 F.3d 797, 802-803 (9th Cir. 2002); *Port of Portland* v. *Director, OWCP (Ronne)*, 932 F.2d 836, 840-841 (9th Cir. 1991). Where, however, an initial injury gives rise to a compensable disability and is later aggravated by a second injury that also creates a right to compensation, the first employer cannot escape liability under the last employer rule for compensation related to the initial injury. See *Benjamin*, 297 F.3d at 803 ("[N]o case holds that two entirely separate injuries are to be treated as one when the first one causes, or is at least partially responsible for, a recognized disability.").

To the contrary, the LHWCA compensates disabilities stemming from cumulative injuries in the same way that it compensates disabilities caused by occupational diseases. For both, compensation is set according to a schedule of benefits, see, *e.g.*, 33 U.S.C. 908(c)(2) (permanent partial disability for loss of use of leg); 33 U.S.C. 908(c)(13) (permanent partial disability for occupational hearing loss), or upon proof of diminished wage earning capacity, see, *e.g.*, 33 U.S.C. 908(b) (temporary total disability); 33 U.S.C. 908(c)(21) (permanent partial disability measured by lost earning capacity with respect to non-scheduled losses).[5]

2. Notwithstanding the court of appeals' error, further review is not warranted in this case. The decision below does not directly conflict with any decision of this Court. Indeed, the last employer rule has never been the subject of this Court's attention. Thus, while the test for liability applied by the court below is in considerable tension with this Court's observation that "[d]isability is a measure of *earning capacity lost* as a result of work-related injury," *Rambo*, 521 U.S. at 127, this Court has not addressed the precise question at issue here.

Although numerous appellate decisions have addressed the last employer rule, moreover, no other court of appeals has considered whether "disability" is a function of physical rather than economic harm within

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[5] It is true, of course, that a claimant seeking permanent partial disability for scheduled losses need not prove diminished earning capacity as an element of his claim. See *Rambo*, 515 U.S. at 296-297. Therefore, "disability" is not in all cases directly tied to wage earning capacity. But, contrary to the court of appeals' view, "disability" never encompasses a mere change in the worker's physical condition, such as the slight worsening of a knee condition like that suffered by Price during his one day of work for petitioner.

the specific context of two-injury cases.[6] To be sure, courts applying the last-employer rule in the context of latent occupational diseases have held that the responsible employer or insurer "is the one covering the risk at the last time the employee was exposed to harmful stimuli '*prior to the date the claimant became disabled*'" by virtue of "decreased earning capacity." *Bath Iron Works Corp.* v. *Director, OWCP*, 244 F.3d 222, 229 (1st Cir. 2001) (quoting *Liberty Mutual*, 978 F.2d at 759 (citing cases)). It is difficult to reconcile that rule with the approach followed by the court below, notwithstanding the panel's attempt to distinguish those precedents. See Pet. App. 7-8. But the occupational disease cases are not squarely on point, and the issue here is a novel one in this context. Absent some reason to believe that this issue is likely to recur frequently, there is no evident need for this Court's review.

In addition, the impact of the decision below on LHWCA enforcement is too uncertain to warrant review at this time. The decision is in obvious tension with Ninth Circuit precedent regarding the meaning of "disability" under the LHWCA, see, *e.g.*, *Cordero*, 580 F.2d at 1334, and with that circuit's precedent rejecting employer liability for a condition from which the worker already suffered its full compensable extent when he came to work for that employer, see *Ronne*, 932 F.2d at 840-841. Thus, it is conceivable that the court's ration-

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[6] Although three other circuits have recognized the Ninth Circuit's formulation of the "two-injury" rule, none has addressed the question presented in this case. See *New Haven Terminal Corp.* v. *Lake*, 337 F.3d 261, 268 (2d Cir. 2003); *Delaware River Stevedores, Inc.* v. *Director, OWCP*, 279 F.3d 233, 241-242 (3d Cir. 2002); *Bath Iron Works Corp.* v. *Director, OWCP*, 244 F.3d 222, 228 (1st Cir. 2001).

ale in sustaining the award against petitioner may not survive reconsideration if a similar case arises within the Ninth Circuit. See Fed. R. App. P. 35(a)(1) (en banc consideration may be ordered when "necessary to secure or maintain uniformity of the court's decisions"); cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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